



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, by Nadine Staneky, Petitioner

vs.

[REDACTED], Respondent

DECISION

Case #: FOF - 168800

Pursuant to petition filed September 18, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General, by Nadine Staneky to disqualify [REDACTED] from receiving FoodShare benefits (FS) one year, a hearing was held on Thursday, November 5, 2015 at 10:30 AM at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General, by Nadine Staneky
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County.

2. On October 1, 2015, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent attempted to traffic FoodShare benefits on Facebook on June 11, 2014 and October 2, 2014. (Exhibit 1)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on November 5, 2015. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at an address on 44th Street. Ms. Stankey indicated that this was the Respondent's last known mailing address and that the agency did not receive any returned mail.

The hearing notice directed the Respondent to contact me with a phone number where she could be reached for the hearing. The Respondent did not do this. An unsuccessful attempt was made to contact the Respondent at [REDACTED]; the outgoing message indicated something to the effect of, "the subscriber you dialed is no longer in service". Accordingly, the hearing proceeded in the Respondent's absence

The Respondent did not contact the Division of Hearings and Appeals within 10 days to explain her failure to appear. As such, it is found that the Respondent did not have good cause for her non-appearance.

What is an Intentional Program Violation (IPV)?

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

What is OIG's Burden of Proof?

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that a program violation occurred.

The Merits of OIG's Claim

This case deals with an allegation of trafficking. Under 7 CFR §271.2, trafficking means:

- (1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;
- (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;
- (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount;
- (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or
- (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.
- (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

This definition became effective November 19, 2013.¹ The previous definition of trafficking did not include attempted trafficking.

More specifically, OIG alleges that the Respondent attempted to traffic FoodShare benefits on June 11, 2014 and October 2, 2014, based upon two Facebook posts:

- 1) “Who got stamps inbox me asap please!!!”
- 2) “Who got some stamps for sale inbox me!!!”

As evidence, OIG presented print offs of screen shots from Facebook, but there is insufficient evidence proving the author and the Respondent are one and the same person. The author of the posts and the Respondent share a last name, but the first names are not identical.

In order to prove the author and the Respondent are one in the same person, OIG provided a photo of two, young, but unidentified boys from the author’s Facebook page and it provided the Respondent’s Case Member history showing that the Respondent has a 7 year old and a 4 year old boy in her assistance group. However, there is no evidence that the unidentified boys in the Facebook photo are the same boys in the Respondent’s assistance group, because the boys in the photo are unidentified. No one with personal knowledge testified that the boys in the photo are, in fact, the Respondent’s kids.

¹ <https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations>

OIG also provided a driver's license of an individual with the same first name and last name as the Respondent, to compare with the author's Facebook photos. However, the Respondent's first and last names are not that unusual or unique. Further, there is no way to connect the Respondent with the driver's license, because OIG did not provide the Respondent's full application, which might have provide her date of birth or her middle initial, to match with the license. It should be noted that the address on the driver's license is not the same address that the agency has on file for the Respondent. Again, since the full applications were not provided, there is no way to check and see if the address on the license was a prior address used for the Respondent.

Because there is no evidence that the person on the driver's license is the Respondent, it is useless for comparison purposes.

Even if the person in the driver's license was the Respondent, the photocopy of the license photo is not of particularly good quality and certainly is not a close enough match to the Facebook photos of the author to definitively say the author of the posts and Respondent are one in the same person. The person in the driver's license appears to be heavy set, with a double chin. The Facebook photos do not show those characteristics. In one of the Facebook photos, the author appears to have a much broader nose than the individual in the driver's license photo.

There is also a glaring inconsistency, as the name in the driver's license has an entirely different middle name than the Facebook author.

It should be noted that one of the Facebook photos cuts off the person's face, so the top of the head is missing from the top of the iris up. In addition, the lighting in the profile photo fades out the person's nose, and the person's face is angled downward, again making it a poor photo for comparison purposes.

In short, there is not enough evidence to say the Respondent and the individual in the driver's license is one and the same person; there is not enough evidence to say the person in the driver's license is the author of the Facebook posts and ultimately, there is insufficient evidence to prove the Respondent was the author of the Facebook posts.

Based upon the record before me, I find that that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent attempted to traffic her benefits.

CONCLUSIONS OF LAW

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShre program.

NOW, THEREFORE, it is ORDERED

That IPV case number IPV case number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

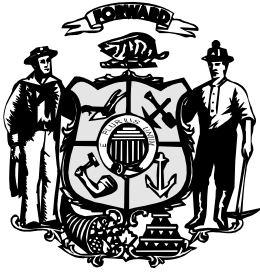
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 25th day of November, 2015

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Nadine Stankey - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 25, 2015.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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